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FM USMISSION USUN NEW YORK
TO RUEHC/SECSTATE WASHDC IMMEDIATE 1462
INFO RUEHGG/UN SECURITY COUNCIL COLLECTIVE IMMEDIATE
RUEHXX/ARAB ISRAELI COLLECTIVE IMMEDIATE
RUEHEE/ARAB LEAGUE COLLECTIVE IMMEDIATE
RUEHZL/EUROPEAN POLITICAL COLLECTIVE IMMEDIATE

C O N F I D E N T I A L SECTION 01 OF 04 USUN NEW YORK 000182

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E.O. 12958: DECL: 03/06/2017

TAGS: [PREL](#) [PTER](#) [UNSC](#) [SY](#) [LE](#)

SUBJECT: PROPOSED NEXT STEPS ON BRAMMERTZ COMMISSION AND
LEBANON TRIBUNAL

Classified By: Ambassador Alejandro D. Wolff, per 1.4 (b) and (d).

1. (C) Summary and Action Request: UNIIIC Commissioner Serge Brammertz is scheduled to deliver his latest report on the Commission's activities March 14 and to brief the Security Council March 21. In order to foster UNSC support for the Commission and Tribunal, USUN recommends that Brammertz incorporate several messages in his report and presentation, notably an assessment that the investigation has reached a point where he is ready to transfer material to a prosecutor and that such action will facilitate his investigation, thereby creating a procedural argument for early establishment of the Tribunal. He should also explain the established prosecutorial practice of engaging in investigative work throughout the trial phase, in order to counter the Russian argument that the Tribunal cannot be established until the Commission concludes its work. This latter argument will ensure Siniora's recent request to extend the Commission does not inadvertently backfire in New York. Finally, recent statements by Council delegations, including new members, underscore the need for Brammertz to strengthen the justification for the expanded mandate of the Commission and Tribunal, which now includes not only the Hariri attack but 16 other terrorist attacks. (Proposed points in para 12.) Separately, USUN solicits an instruction to work with other members of the Security Council to request a written explanation from the UN Office of Legal Affairs outlining the steps necessary to make the Tribunal operational and the required timeline (which OLA estimates is at least six months), in order to underscore why the Commission's mandate must be extended before its scheduled expiration on June 15, 2007. These proposed measures are designed to sustain Security Council support for the investigation and prosecution of the Hariri and other related terrorist assassinations in Lebanon. End Summary and Action Request.

Background: How We Got Here

2. (SBU) In order to understand what next steps make sense, it is useful to recall the recent and complex history of Security Council action in response to the assassination of former Lebanese Prime Minister Rafiq Hariri and 22 others on February 14, 2005. On February 15, 2005, the Security Council adopted a Presidential Statement which provided the authority for Secretary-General Annan to dispatch an investigator (Irish national Patrick Fitzgerald) on a fact-finding mission to Lebanon to report "on the circumstances, causes and consequences of this terrorist act." Fitzgerald found the Lebanese authorities had neither the "capacity nor commitment" to reach a "satisfactory and credible" conclusion to the investigation, paving the way for

the Council to adopt UNSCR 1595 on April 7, 2005. This resolution established the International Independent Investigative Commission for a period of three months upon its formation, with the option -- which was exercised -- to extend for an additional three months, to December 15, 2005. During this period the Commission was led by German prosecutor Detlev Mehlis.

13. (SBU) On December 15, 2005, the Council adopted UNSCR 1644, which extended the Commission for another six months, and expanded its role to extend technical assistance to the Lebanese authorities "with regard to their investigations on the terrorist attacks perpetrated in Lebanon since 1 October 2004." UNSCR 1644 also asked the Secretary-General to respond to the Lebanese government's request to identify what steps must be taken to establish a "tribunal of an international character" to bring the perpetrators to justice.

14. (SBU) In January 2006, Belgian prosecutor Serge Brammertz replaced Mehlis. It was now clear that the Commission's role had been transformed from temporary investigative support to a member state to an investigation conducted according to international standards of law in preparation for a trial to be conducted by an internationally assisted tribunal. On March 29, 2006, the Council adopted Resolution 1664, which requested the Secretary-General to negotiate an agreement with the Government of Lebanon "aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice." On June 15, 2006, the Council adopted UNSCR 1686, which extended the Commission's mandate for one year, through June 15, 2007.

15. (SBU) On November 21, 2006, the Security Council sent a letter to the Secretary-General inviting him to conclude with the GOL the agreement and statute negotiated between the UN

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and the GOL on the Tribunal, in conformity with the Lebanese constitution. On November 25, 2006, the Lebanese government approved the Tribunal agreement and statute, and forwarded the documents to President Lahoud for issuance. The President declined to issue the necessary decree, so -- according to the Lebanese constitution -- the government reaffirmed its decision and sent the documents to the Lebanese Parliament, which has not yet acted. On February 6, 2007, the UN signed the agreement to establish the Tribunal, noting "it is up to the competent Lebanese authorities to take the steps necessary under the Lebanese constitution to allow for the approval and ratification of the agreement, to allow it to enter into force. The Tribunal could then be made operational with the full support of the UN." (Comment:

This lengthy summary of Security Council actions related to the Hariri assassination during the past two years, which is by no means exhaustive, explains why some members of the Council complain variously of Lebanon fatigue, alleged double standards in addressing issues of peace and security, and a degree of international involvement in Lebanese affairs so significant that it undercuts the Council's stated goal of supporting Lebanese sovereignty. End Comment.)

Managing SC Support for the Commission and Tribunal

16. (C) On February 21, Lebanese Prime Minister Siniora sent a letter to UN Secretary-General Ban Ki-Moon requesting an extension of up to one year of the UN International Independent Investigative Commission (UNIIIC). The UN has not yet circulated this letter to the Security Council, pending consultations with UNIIIC Commissioner Brammertz. (Note: The UN Secretariat advises that it may choose not to circulate the letter at all and instead just refer to it in the SYG,s cover letter attached to the next UNIIIC report, which is how the Secretariat handled PM Siniora,s May 2006 letter requesting an extension of UNIIIC,s mandate. End Note.) Absent clarification about the relationship between the Commission and the Tribunal, or a separate justification

and request by Brammertz for an extension, there is a danger this request could backfire. Because the Commission's mandate does not expire until June 15, 2007, and Security Council practice is generally to renew mandates at the date of expiration, this early request -- absent a compelling investigative rationale -- could be seen by some Council members to politicize what has been unanimous support among member states of the Security Council for the Commission since its establishment in 2005.

¶17. (C) Secondly, while there is no doubt that international support for the investigation must be sustained, we need to ensure that our action in the Security Council on the Commission does not inadvertently undercut our arguments to promptly establish the Tribunal. For example, the Russians and others will argue that the extension of the Commission and its investigative role for an additional year means there is no need to take action on the Tribunal until 2008 as the investigation is not yet complete. This argument exploits the ambiguity and ignorance about prosecutions and tribunals among Security Council delegations, which we need to address. Brammertz and OLA can play an important role in clarifying this process, thereby providing objective rationale for action on both the Commission and Tribunal.

A Recipe for a Tribunal

¶18. (SBU) Confusion also persists about the process required to establish a Tribunal. According to OLA, the process involves several steps, including securing funding, identifying a seat for the court, and hiring a registrar and judges. Because the Commission already exists, the UN will not need to hire staff for a prosecutor's office, although a prosecutor himself will need to be identified as Brammertz has steadfastly said he does not want to serve in that role. The UN will have to secure funding to enable the Tribunal to become operational, however, before UNIIIC staff can be subsumed under the prosecutor's umbrella. OLA says the UN has done as much preparatory work as possible prior to ratification of the agreement, but estimates the process to establish the Lebanese Tribunal will still take an additional six to eight months. Therefore, even if the Tribunal is created before June 15, 2007 -- when the Commission's mandate is set to expire -- UNIIIC's mandate will still need to be extended because the UN will have not yet had the necessary time to establish the Tribunal. These basic facts, however, are not widely known.

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To Merge or Not to Merge

¶19. (SBU) Tribunals typically consist of four main parts: the court, the prosecutor, the registry, and the defense office. The UN has been involved in the establishment of four Tribunals over the past 10 years (Sierra Leone, Cambodia, ICTY, ICTR). In no other case has the investigative function performed by the prosecutor -- which in Lebanon has been handled by the Commission -- been independent of the Tribunal. In all other cases the investigative function has been handled by the prosecutor's office within the tribunal, and, moreover, the investigative process has continued throughout the trial phase. Upon taking over the Commission, Brammertz -- a former ICC prosecutor -- began organizing the information he collected in a way that would be useful to a prosecutor, including in the preparation of indictments. At some point, however, the prosecutor's office will need to be formally established with the authority necessary to prepare indictments and engage with a court in order for the investigation to proceed.

¶10. (SBU) Therefore it is not appropriate to wait for the Commission to "finish" its investigation before establishing the Tribunal's prosecutor's office. (And, once the

prosecutor's office begins preparing indictments, it will need an established court.) Because the volatile political environment in Lebanon has resulted in the provision of international investigative and judicial assistance to the Lebanese in fits and starts, a false perception of a dichotomy between the Commission and the Tribunal has inadvertently been created. Opponents of the Tribunal are exploiting this confusion to argue for delay in establishing it.

Creating a Monster?

¶11. (SBU) Although Brammertz has previously explained that through the provision of technical assistance to the Lebanese authorities in the other terrorist incidents he has identified links to the Hariri assassination which have benefited his primary task of identifying the perpetrators of the attack of February 14, 2005, the relevance of the relationship between these two tasks remains unclear to many delegations. The resulting confusion over the Commission's mandate and the jurisdiction of the Tribunal has led some delegations to conclude that the scope of international assistance to Lebanon is excessive, and this misunderstanding is weakening support for both.

Suggested Points for Brammertz

¶12. (C) Given the complexity of these matters and their importance to securing Council support for the Commission and the Tribunal, USUN recommends Washington instruct Embassy Beirut to raise with Brammertz the importance of explaining the investigative and trial processes. We recommend he highlight the following issues in his upcoming report to the Council:

-- Explain the need for the investigation to continue during the trial phase, as is the practice in all prosecutions, thereby laying the grounds for extending the Commission's mandate while countering the Russian argument that the Tribunal cannot be established until the Commission's investigation is concluded.

-- Describe the components of a Tribunal -- including a prosecutor's office and a court. Describe how a prosecutor performs various roles, including investigator and trial lawyer. Underscore from a prosecutor's investigative perspective that establishing a Tribunal will help encourage witnesses to come forward to offer their testimony. Report that his investigation has reached the point whereby he is ready to transfer material to a prosecutor, and therefore the (establishment of a prosecutor would facilitate the investigation) (the absence of a prosecutor hinders progress on the investigation). In this way he will create an apolitical, procedural argument for the establishment of the Tribunal.

-- Emphasize that his primary task remains investigation of the Hariri assassination, and explain how the provision of technical assistance to the Lebanese authorities in other cases has uncovered links to the Hariri case that have proved beneficial to that investigation (and vice versa).

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-- Clarify that unlike requests for investigative assistance made to Syria under Chapter VII of the UN Charter, the "non-cooperating" third countries referenced in the December 2006 UNIIIC report were asked to provide voluntary technical assistance and that the Commission can manage requests for such assistance on its own.

-- Report on the difficulty of retaining experienced and competent investigative staff while there is ambiguity about the length of the Commission's mandate. Therefore recommend

the Commission be extended. Consider making clear the expectation that the Commission should become the prosecutor's office once the Tribunal is established. Make clear that premature termination of the Commission would waste two years of investment by Lebanon and the international community and thwart the achievement of justice.

Comment

¶13. (C) Based on his past statements, we expect Brammertz will resist some of these suggestions. We do not know the status of his investigation and therefore cannot know for sure that is appropriate for him to declare his readiness to transfer material to a prosecutor and that such engagement would facilitate the investigation. But we think it is worth impressing upon Brammertz that if he declines the opportunity to speak clearly and forthrightly in the upcoming briefing, the current political climate in Lebanon and the Security Council may well imperil the previous two year's of work by the Commission and ultimately deny the Lebanese justice.

WOLFF